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No. 96-1613

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ESTATE OF FRANCIS J. ROMANI

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent devotes the first and largest portion of its argument (Resp. Br. 10-26) to a contention that was neither raised nor addressed in the courts below. The question addressed below was whether the preference established by the absolute priority statute for claims of the United States was implicitly repealed, for tax claims, by the provisions of the Federal Tax Lien Act. Respondent now asserts, however, that it was "incorrect" for the Pennsylvania Supreme Court to reach and decide that question (Resp. Br. 10). Respondent asserts that it is unnecessary to reach that question because this case involves a competing private judgment lien and, in respondent's view, the absolute priority statute "does not override judgment liens on real property" (*ibid.*). Respondent claims that the Pennsylvania Supreme Court was "incorrect" in assuming to the contrary (*ibid.*).

Respondent did not raise this contention in the courts below or in its brief in opposition at the petition stage. To the contrary, the brief filed by respondent in the Pennsylvania Supreme Court reflects the very same "assumption" that respondent now criticizes that court for making (Resp. Br. 10; see Resp. Br. Pa. Sup. Ct. 2, 4-10). It is plainly "inappropriate" for respondent to disavow its long-standing position and seek to raise a new contention in this Court "in the first instance." *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302, 312 (1971). See also *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); Sup. Ct. R. 15.2. Moreover, the new contention that respondent belatedly seeks to advance has been addressed and rejected by this Court on several occasions.

a. The plain text of the absolute priority statute requires any claim of the United States to "be paid first" from the estate of an insolvent debtor. 31 U.S.C. 3713(a). In *Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) 396 (1817), this Court held that the absolute priority statute requires debts owed to the United States to be paid first even when a competing creditor possesses a valid and enforceable judgment lien in the assets of the estate. The Court stated (*id.* at 426):

> A judgment gives to the judgment-creditor a lien on the debtor's lands, and a preference over all subsequent judgment-creditors. But the act of congress defeats this preference in favour of the United States, in the cases specified in the 65th section of the act of 1799.

The Court concluded that, for a competing private lien claim to be excepted from the operation of the absolute priority statute, the property to which the lien applies

must be divested from the debtor's estate before the claim of the United States accrued (*ibid.*):[1]

> If * * * before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fi. fa.*, the property is divested out of the debtor, and cannot be made liable to the United States.

This Court has often cited and relied on this holding of *Thelusson*. See, *e.g.*, *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 366 (1953); Pet. Br. 15. Applying *Thelusson*, the Court has consistently concluded that, so long as the property has not been "divested" from the debtor's estate by "a change of title or possession," the absolute preference established by the statute for the United States to "be paid first" from the assets of that estate is controlling. *New York* v. *Maclay*, 288 U.S. 290, 293-294 (1933).[2]

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[1] The abbreviation "*fi. fa.*" in this passage from the decision in *Thelusson* refers to the common law writ of *fieri facias*. That writ commanded the sheriff to execute on a judgment by seizing and selling the personal and real property of the judgment debtor. See, *e.g.*, Shippen Lewis, *Eliminating Archaic Features of Execution Process in Pennsylvania*, 63 U. Pa. L. Rev. 652, 652-653, 656 (1915); *W.H. Powell Lumber Co.* v. *Federal Land Bank Ass'n*, 561 S.W.2d 700, 703 (Mo. Ct. App. 1978); *Black's Law Dictionary* 754 (4th ed. 1968).

[2] The Court has often emphasized that any creditor who seeks to establish an implied exception from the absolute priority statute bears a heavy burden. See *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805); Pet. Br. 17-18. Respondent simply overlooks this precedent in contending that "the government bears a heavy burden to establish that the federal priority statute abrogates centuries of common-law protection" (Resp. Br. 12). In *Thelusson* and *New York* v. *Maclay*, *supra*, the Court plainly rejected the suggestion that there is "common-

This longstanding interpretation of the absolute priority statute is entitled to especially heavy deference. As this Court stated in *Neal* v. *United States*, 116 S. Ct. 763, 769 (1996):

> [W]e give great weight to *stare decisis* in the area of statutory construction [unless] * * * intervening development of the law has "removed or weakened the conceptual underpinnings from the prior decision or * * * later law has rendered the decision irreconcilable with competing legal doctrines or policies." * * * Absent those changes or compelling evidence bearing on Congress' original intent, *NLRB* v. *Longshoremen*, 473 U.S. 61, 84 (1985), our system demands that we adhere to our prior interpretations of statutes [even where] * * * there may be little in logic to defend the statute's treatment * * *.

b. Respondent errs in contending that this Court has "disavowed the broad holding" of *Thelusson* (Resp. Br. 18). In *New York* v. *Maclay*, 288 U.S. at 293-294, the Court adopted the very holding that respondent claims has been "disavowed." In that case, the Court explained that a judgment lien creditor who has not obtained "title or possession" from the estate "by seizure * * * or some other equivalent act" cannot prevail against the plain command of the statute that the United States "be paid first." *Ibid.* See also *United States* v. *Gilbert Associates, Inc.*, 345 U.S. at 366 (the competing creditor must have "divested" the insolvent debtor "of either title or possession"); Pet. Br. 15 (citing cases).[3]

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law protection" for judgment liens from the absolute priority of the United States. See also note 3, *infra*.

[3] Respondent urges that judgment liens are traditionally perfected without acquiring possession of the property and that the government's position in this case is therefore "unwarranted as a matter of precedent, history, and common sense" (Resp. Br. 20). That argument simply misses the point of *Thelusson* and its numerous progeny. The fact that the private lien may be valid as against other liens does not mean that it defeats the absolute priority of the government's claim in insolvencies. In *United States* v. *Gilbert Associates, Inc.*, *supra*, the Court relied on *Thelusson* in holding that a federal tax claim is entitled to priority over a prior-filed state tax lien. The Court stated (345 U.S. at 366):

> In claims of this type, "specificity" requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. *Thelusson* v. *Smith*, 2 Wheat. 396. Until such possession, it remains a general lien.

When the private creditor has not taken sufficient steps to "divest" the property from the insolvent's estate, the United States "shall be paid first" under the plain text of the statute. 31 U.S.C. 3713(a). The Court thus held in *Gilbert Associates* that, because "[t]he taxpayer had not been divested by the Town of either title or possession * * *, [the absolute priority statute] clearly awards priority to the United States" (345 U.S. at 366).

Respondent is also incorrect in its premise (Resp. Br. 20-21) that the decisions establishing this rule involved only personal, and not real, property. *Thelusson* v. *Smith* itself involved a judgment lien on real property. See 15 U.S. (2 Wheat.) at 425.

[4] In *United States* v. *Hooe*, 7 U.S. (3 Cranch) at 91, the absolute priority statute was inapplicable because the debtor's deed of trust conveyed only part of his property to trustees. For the absolute priority statute to be applicable, it was necessary for the debtor to have made a

Respondent is also incorrect in claiming that, in four early decisions, the Court rejected the analysis of *Thelusson* and held that "the federal priority statute does not override antecedent security interests" (Resp. Br. 16, 18). Two of the cases that respondent cites (*United States* v. *Hooe*, 7 U.S. (3 Cranch) 73 (1805); *United States* v. *Hack*, 33 U.S. (8 Pet.) 271 (1834)) do not even involve the question of the effect of the absolute priority statute on perfected liens.[4] The other two cases (*Conard* v. *Atlantic Insur-*

ance Co., 26 U.S. (1 Pet.) 386 (1828); *Brent* v. *Bank of Washington*, 35 U.S. (10 Pet.) 596 (1836)) are fully consistent with *Thelusson*. The creditor in both *Conard* and *Brent*, unlike the creditor in *Thelusson*, obtained title or possession of the disputed property *before* the government's priority claim accrued.[5] As this Court explained in *Massachusetts* v. *United States*, 333 U.S. 611, 634 n.38 (1948), the decisions in *Conard* and *Brent* "did not contemplate that exceptions were being made" from the absolute priority statute but "conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor." In arguing to the contrary, respondent ignores the Court's explanation of its own decisions and, in particular, ignores the Court's

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voluntary assignment of all his property. *Ibid*. See also 31 U.S.C. 3713(a)(1)(A)(i).

In *United States* v. *Hack*, 33 U.S. (8 Pet.) at 275, the absolute priority statute was inapplicable because the funds assigned for the benefit of creditors were "not the funds of John Stouffer, the debtor of the United States, but of [the partnership] of John and Jacob Stouffer * * *; and the partnership property is insufficient to satisfy the partnership creditors."

[5] *Conard* v. *Atlantic Insurance Co.*, 26 U.S. (1 Pet.) at 446, involved a competing creditor who possessed an endorsed bill of lading that "purport[ed] to be a transfer *in praesenti*" and which served as "a mortgage of the goods, and the returns" (*id.* at 447). *Brent* v. *Bank of Washington*, 35 U.S. (10 Pet.) at 614, involved the right of the issuer of stock to refuse any transfer until the obligations owed to it were fully paid.

Respondent errs in relying (Resp. Br. 17) on *United States* v. *Lewis*, 26 F. Cas. 320 (C.C. E.D. Pa.) (No. 15,595), aff'd, 92 U.S. 618 (1875). The rights of lienholders under the absolute priority statute were not at issue in that case because, as the court noted, "there are no liens in this case to interfere with the priority of the United States." 26 F. Cas. at 924.

emphatic warning that it is "loath to expand" such an exception "to include other types of lien" (*ibid.*).

The Court similarly distinguished *Conard* and *Brent* in *New York* v. *Maclay*, 288 U.S. at 293-294. The Court observed that the distinction between *Conard* and *Brent* on the one hand, and the *Thelusson* line of cases on the other, flows from the "distinction between the liens of judgments and of mortgages." *Id.* at 294. The Court explained that, while a judgment lien does not effect a transfer of title or possession, mortgage liens "have been thought to have the effect of a conveyance, divesting the debtor of his title and leaving nothing but an equity to which a preference can attach." *Ibid.*.[6]

The decisions of this Court have consistently articulated the principle that a "general judgment lien upon the lands of an insolvent debtor does not take precedence over claims of the United States unless execution of the judgment has proceeded far enough to take the land out of the possession of the debtor." *United States* v. *Texas*, 314 U.S. 480, 485 (1941).[7] The competing creditor cannot prevail against the absolute priority of the United States in insolvency cases unless the creditor has obtained title or

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[6] The Court noted in *New York* v. *Maclay*, 288 U.S. at 294, that it had not determined "whether the holding in the mortgage cases is to be applied in jurisdictions where a mortgage upon real estate is a lien and nothing more." Because that case, like the present case, did not involve a mortgage, the Court stated that "[i]nto these refinements and their consequences, there is no need to enter now." *Ibid*.

[7] The Court noted in *United States* v. *Texas*, 314 U.S. at 486, that early decisions had held that a mortgagee would avoid the government's absolute priority. The Court stated, however, "that it intended by its decision to lend no support to the assumption that the doctrine of the mortgage cases, whatever its current vitality, would require the subordination of unsecured claims of the United States to a specific and perfected lien." *Ibid*.

possession of the disputed asset and thus divested that asset from the insolvent's estate in advance of the accrual of the government's claim. See, *e.g.*, *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 376 (1946); note 3, *supra*.[8]

c. Respondent mistakenly asserts (Resp. Br. 21-22) that a lien that is perfected under state law is necessarily excepted from the government's absolute priority in insolvency. To be excepted from the operation of the absolute priority statute, it is a necessary but not a sufficient condition for the lien to be perfected under state law. *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. at 371 ("[A] state court's characterization of a lien as specific and perfected is not conclusive" for purposes of the absolute priority statute.); *Spokane County* v. *United States*, 279 U.S. 80, 95 (1929). See note 3, *supra*. See *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 357 (1945). In addition to being perfected under state law, a competing lien can defeat the federal claim under the absolute priority statute only if "before the right of preference has accrued to the United States * * * the property is divested out of the debtor." *Thelusson* v. *Smith*, 15 U.S. (2 Wheat) at 426. Such divestment occurs when "seizure by a marshal or some other equivalent act has * * * brought about a change of title or possession." *New York* v. *Maclay*, 288 U.S. at 293-294. Unless the private lien "divests" title or possession of the asset from the debtor's

[8] Respondent misstates our position by claiming that the United States advocates "that judgment liens, for purposes of the priority statute, are not perfected unless and until they are reduced to possession" (Resp. Br. 23). See also *id.* at 20. We advocate only what this Court held in *Thelusson* v. *Smith*, *New York* v. *Maclay*, and other similar cases (Pet. Br. 15)—that a private judgment creditor may avoid the absolute priority of the United States only by "divesting" the disputed property from the insolvent's estate by obtaining a change of possession *or* title before the government's absolute priority accrues.

estate, the priority of the United States remains absolute. See note 3, *supra*. See also *United States* v. *Vermont*, 377 U.S. 351, 358 n.8 (1964); Pet. Br. 15 n.5.

Respondent is thus not correct in asserting that its judgment lien "satisfies all of the federal requirements imposed by this Court" for a private lien to prevail against the government's absolute priority (Resp. Br. 20). Although respondent possessed a valid judgment lien, respondent took no steps to execute on that lien or to obtain title or possession of the property before the absolute priority of the government arose. See *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. at 376 (the competing lien is not excepted from the absolute priority statute because the creditor "acquired neither title nor possession, *Thelusson* v. *Smith*").

d. Respondent asserts that the longstanding rule of the *Thelusson* line of cases poses "significant practical problems" for commercial creditors (Resp. Br. 23). It is apparent, however, that commercial creditors have been able to coexist with the absolute priority statute—and with this Court's application of that statute to judgment liens—during the 180 years since *Thelusson* was decided. History refutes respondent's concern over "practical" problems.[9] See also notes 6 & 7, *supra*.

[9] Contrary to respondent's assumption, commercial security interests are not inherently impervious to competing interests. For example, under the Uniform Commercial Code, a buyer in the ordinary course of business takes free of a security interest in inventory created by the seller even though the security interest is perfected and even though the buyer knows of its existence. See, *e.g.*, 13 Pa. Cons. Stat. Ann. § 9307 (Purdon 1984). Numerous provisions of the Uniform Commercial Code require a secured party to obtain possession of particular kinds of collateral to defeat the interests of third parties or other secured creditors. See, *e.g.*, *id.* § 9304 (letters of credit, money, instruments other than instruments constituting a part of chattel paper),

This Court has, in any event, repeatedly rejected reliance upon such "practical" objections to the absolute priority statute. See *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805); Pet. Br. 32-33. As the Court stated in *United States* v. *Emory*, 314 U.S. 423, 431 (1941):

> In the first place, whatever may be the merits of the contention, it should be addressed to Congress and not to this Court. In the second place, the argument proves too much. If it is sound as applied to this kind of a claim of the United States, it is equally sound as applied to all claims as to which the United States asserts priority under [the absolute priority statute].

e. Respondent objects (Resp. Br. 24) to the fact that creditors of an insolvent debtor may receive different treatment under the absolute priority statute than they would under the Bankruptcy Code. Congress, of course, directly provided for that result in 1978, when it elected to make the absolute priority statute inapplicable to cases brought under the Bankruptcy Code. 31 U.S.C. 3713(a)(2); Pet. Br. 12 n. 4. By *expressly* eliminating application of the absolute priority statute in one carefully drawn context, Congress cannot be understood *impliedly* to have eliminated the statutory priority in all other contexts as well.

f. Respondent errs in asserting that the absolute priority statute runs afoul of the Takings Clause of the Fifth Amendment (Resp. Br. 25-26). The absolute priority statute was enacted almost 200 years before respondent acquired its judgment lien. Whatever rights respondent

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§ 9305 (goods, instruments, money, negotiable instruments, chattel paper), § 9308 (purchaser of chattel paper or instruments), § 9309 (holder in due course of negotiable instrument, or holder to whom a negotiable document of title has been negotiated, or protected purchaser of security).

acquired under its lien, those rights were subject to the preexisting scheme of regulation—and to the absolute priority statute.

In a few narrow settings, this Court has construed statutes affecting the rights of creditors to be prospective in their application to avoid takings issues. See, *e.g.*, *United States* v. *Security Industrial Bank*, 459 U.S. 70, 78-82 (1982). The application to respondent of this Court's 180-year-old precedents interpreting this 200-year-old statute threatens no retroactive taking of rights: "since the insolvency act has been a law of the United States * * * for approximately two hundred (200) years, this is not a case where the United States has taken action to destroy or deprive a judgment lienholder of property rights which existed before the government's action." *Westmoreland* v. *Westmoreland*, 716 F. Supp. 217, 222 (D.S.C. 1988). See also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).

2. The Federal Tax Lien Act does not impliedly repeal application of the absolute priority statute to tax claims of the United States.

a. The Court has clearly described the standard that must be met to sustain the heavy burden of establishing an implied repeal of the absolute priority statute. Recognizing that the statute "on its face permits no exception whatsoever" (*United States* v. *Vermont*, 377 U.S. at 357), the Court has held that "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to the operation of so clear a command * * *." *United States* v. *Emory*, 314 U.S. at 433. The Court explained in *United States* v. *Key*, 397 U.S. 322, 332 (1970), that the requisite "plainest inconsistency" could occur only if (i) the competing statute is logically inconsistent with the absolute priority statute; (ii) an unconditional application of the absolute priority statute would deprive the competing

statute of any meaning; or (iii) the history and text of the competing statute reflect an actual intent by Congress to modify the absolute priority statute. *Id.* at 324-326, 332. For the reasons described in our opening brief (Pet. Br. 19-33) and further discussed below (pages 17-19, *infra*), that standard is not met in this case.

b. Recognizing the heavy burden imposed by this standard, respondent seeks to invoke an entirely different principle of statutory construction. Respondent urges the Court to apply the interpretive principle that "a specific statute" should prevail in a conflict "with an *earlier* and more general statute" (Resp. Br. 28).[10] Respondent asserts that, in five early decisions involving the absolute priority statute, the Court applied that interpretive principle rather than the "plainest inconsistency" standard articulated in *Emory* and *Key* (Resp. Br. 29-30).[11]

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[10] Respondent incorrectly asserts that the government's brief in the court below acknowledged that, if a "general" statute must give way to a "specific" statute, the broad mandate of the absolute priority statute "should yield to the specific priorities of the tax lien legislation" (Resp. Br. 30 n.28). The material that respondent quotes is an extract from a law review note set forth in our brief; it is not from the text of the government's argument. Moreover, the portion of the note that respondent *fails* to quote is directly at odds with the position that respondent urges (U.S. Br. Pa. Sup. Ct. 26, quoting Note, *Nesbitt v. United States: Denying an Implied Tax Lien Exception to the Federal Priority in Insolvency*, 33 Cath. U. L. Rev. 741, 772 (1984)):

> Though general rules of construction suggest that the broad mandate of section 3466 should yield to the specific priorities prescribed by the tax lien legislation, such rules are inapplicable in light of the Supreme Court's demonstrated attitude of special deference to the Insolvency Statute. Rather, the three-part "plainest inconsistency" test enunciated by the Court in *United States v. Key* must control * * *.

[11] The cases on which respondent relies are *United States* v. *Guaranty Trust Co.*, 280 U.S. 478 (1930); *Mellon* v. *Michigan Trust Co.*, 271 U.S. 236 (1926); *Davis* v. *Pringle*, 268 U.S. 315 (1925); *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U.S. 152 (1912); and *Cook County National Bank* v. *United States*, 107 U.S. 445 (1883). These cases were all decided before the Court described the "plainest inconsistency" standard in *Emory* in 1941 and before the Court further articulated that standard in *Key* in 1970. It is implausible for respondent to rely on pre-*Emory* decisions to contend that the interpretive standard adopted and applied in *Emory* and *Key* is no longer controlling. See notes 12 & 13, *infra*.

This Court has, however, previously addressed and rejected that contention. In *United States* v. *Emory*, 314 U.S. at 432-433, the Court reviewed the very decisions on which respondent relies and concluded that they are consistent with the requirement that "[o]nly the plainest inconsistency" with the absolute priority statute "would warrant our finding an implied exception" to that statute. *Id.* at 433. In *Emory*, the Court rejected the contention that the more specific and more recent provisions of the National Housing Act superseded application of the absolute priority statute to government loan claims arising under that Act (314 U.S. at 430):

> We are aware of no canon of statutory construction compelling us to hold that the word "first" in a 150 year old statute means "second" or "third," unless Congress later has said so or implied it unmistakably.

Explaining that "[o]nly the plainest inconsistency would warrant our finding an implied exception" to the absolute priority statute (*id.* at 433), the Court reviewed the earlier decisions on which respondent now relies (note 11, *supra*) and held that they do not "require[] a different conclusion" (*id.* at 431-432).[12]

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[12] The Court distinguished *Cook County National Bank* v. *United States*, *supra*, on the ground that the statute involved in that case "included specific provisions concerning the distribution of the assets of insolvent banks which were plainly inconsistent with the granting of

Following the decision in *Emory*, the Court has consistently applied the standard articulated in that case in evaluating claims of an implied repeal of the absolute priority statute. See, *e.g.*, *United States* v. *Moore*, 423 U.S. 77, 82-83 (1975); *SBA* v. *McClellan*, 364 U.S. 446, 453 (1960) (absolute priority statute is not "plainly inconsistent" with the purposes and provisions of the Small Business Act); *United States Department of Agriculture* v. *Remund*, 330 U.S. 539, 544 (1947) ("there is no irreconcilable conflict between giving emergency loans to distressed farmers and giving priority to the collection of these loans pursuant to § 3466"); *Massachusetts* v. *United States*, 333 U.S. at 634; *Illinois* v. *United States*, 328 U.S. 8, 12 (1946).[13] In *United States* v. *Key*, *supra*, this Court elaborated the standard of *Emory* by establishing a three-part test for determining whether a plain inconsistency exists between the absolute priority statute and subsequent legislation. See pages 11-12, *supra*. The Court has

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priority to general claims of the United States." *United States* v. *Emory*, 314 U.S. at 432. The Court similarly distinguished *United States* v. *Guaranty Trust Co.*, *supra*, on the ground that there was a "direct inconsistency" between the Transportation Act of 1920 and the absolute priority statute that precluded application of the latter statute. *United States* v. *Emory*, 314 U.S. at 432-433. See also note 13, *infra*.

[13] In *United States Department of Agriculture* v. *Remund*, 330 U.S. at 544-545, the Court reversed the decision of the court of appeals which had relied (as respondent would) on *United States* v. *Guaranty Trust Co.*, *supra*, in holding that emergency loans made to farmers pursuant to the Acts of February 23, 1934, and June 19, 1934, were excepted from the absolute priority statute. The Court stated (330 U.S. at 544-545):

> We reiterate what was said in *United States* v. *Emory*, 314 U.S. 423, 433: "Only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466 [the absolute priority statute]." In this case, as in that, we think such inconsistency is wholly wanting. *United States* v. *Guaranty Trust Co.*, *supra*, is therefore inapposite.

now consistently applied the interpretive principles established in *Emory* and *Key* for more than fifty years. See, *e.g.*, *United States* v. *Moore*, 423 U.S. at 82-83; Pet. Br. 17-18. As the Court has expressly concluded, nothing in the cases on which respondent relies supports a departure from that analysis. *United States* v. *Emory*, 314 U.S. at 431-432; notes 12 & 13, *supra*.

c. The interpretive principle that a more specific and recent provision may impliedly repeal a more general statute does not, in any event, support respondent's position in this case. It is not realistic to assert that *either* of the two statutes involved in this case is "more specific" than the other. The absolute priority statute and Section 6323 are *both* "specific" statutes that apply only in narrowly and precisely defined situations.

The absolute priority statute applies only to insolvencies that are manifested in one of the modes specified by the statute—to cases in which the estate of a debtor is insolvent, cases in which the debtor makes a voluntary assignment of his property, and cases in which the property of an absent debtor is attached. 31 U.S.C. 3713(a)(1)(A); *United States* v. *Oklahoma*, 261 U.S. 253, 259-260 (1923). The absolute priority statute has no application to the far greater number of cases that involve either solvent debtors or insolvent debtors in bankruptcy. 31 U.S.C. 3713(a)(2). The rights of competing creditors in those ordinary situations are determined under the tax lien provisions of 26 U.S.C. 6323 and not under the absolute priority statute.[14]

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[14] "Where one of the competing liens is a federal tax lien," the provisions of 26 U.S.C. 6323 determine the lien priorities in bankruptcy cases. *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1176 (6th Cir. 1990). Moreover, the bankruptcy trustee is armed with the status of a hypothetical judgment lien creditor and bona fide purchaser of real property (11 U.S.C. 544) and 26 U.S.C. 6323 determines whether the

Indeed, there are vastly more tax claims asserted in cases involving solvent debtors and in bankruptcy cases (to which the federal tax lien rules set forth in 26 U.S.C. 6323 apply) than in non-bankruptcy insolvencies (to which the absolute priority statute applies).[15] Thus, while the absolute priority statute could be said to be more "general" in the sense that it applies to non-tax as well as tax claims of the government, it is more "specific" in that it is inapplicable to solvent debtors and to insolvent debtors in bankruptcy. Conversely, while the federal tax lien provisions are more "general" in the sense that they apply to the typical debtors who are either solvent or in bankruptcy, they are more "specific" in the sense that they apply only to tax claims.

The proper reconciliation of any competing applications of these two statutes thus cannot rationally be resolved based upon generalities about which statute is more "specific" and which is more "general" in nature. Instead, recognizing the age and narrow sphere of operation of the absolute priority statute, the Court has consistently concluded that the clear command of that statute that the United States "be paid first" (31 U.S.C. 3713(a)) "must

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trustee may avoid the tax lien in bankruptcy. *In re LMS Holding Co.*, 50 F.3d 1526 (10th Cir. 1995). Cf. *Farrey* v. *Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy.").

[15] The Internal Revenue Service advises us that, for the period of October 1, 1994, to September 30, 1996, there were 89,740 bankruptcy cases in which the United States filed tax claims. During that same period, there were 565 cases involving the absolute priority statute in which the government filed claims. Of those 565 cases, 121 arose in general receivership proceedings and 444 arose in decedent's or incompetent's estates. The tax claims filed in bankruptcy proceedings totaled $3.6 billion to $4 billion per year. The tax claims filed in cases involving the absolute priority statute averaged $150 million per year.

apply according to its terms except where expressly superseded, or where excluded by a later enactment 'plainly inconsistent' with it." *United States* v. *Key*, 397 U.S. at 332. See also Pet. Br. 17-18.

d. As we explain in detail in our opening brief (Pet. Br. 19-21), the absolute priority statute and the federal tax lien provisions are not logically or "plainly" inconsistent. The two statutes differ in their scope and address different concerns.

The absolute priority statute governs the priority of claims of the United States only in specified types of insolvencies. 31 U.S.C. 3713(a)(1). The Court has long noted that, in enacting the absolute priority statute, Congress deliberately chose to establish greater protection for the United States in cases involving insolvent debtors than in cases "[w]here the debtor is not insolvent." *United States* v. *Vermont*, 377 U.S. at 358. To accomplish this greater protection in this narrow category of cases, the absolute priority statute operates independently of liens possessed by the United States, including liens for taxes. In the narrow situations to which it applies, the absolute priority statute requires the United States to "be paid first" "whether or not [its claim is] secured by a lien." *Id.* at 357. Accord, *United States* v. *City of New Britain*, 347 U.S. 81, 85 (1954). There is no logical inconsistency in the decision of Congress to give the United States priority in the narrow categories of cases described in the absolute priority statute while *not* giving it priority in other settings. See *United States* v. *Vermont*, 377 U.S. at 358.

Respondent errs in asserting that, if the absolute priority statute governs according to its terms in cases involving tax claims, the federal tax lien provisions of 26 U.S.C. 6323 would be made inoperative "in the vast majority of cases where those priorities could even possibly be signifi-

cant" (Resp. Br. 33).[16] Far more tax claims are determined in cases involving solvent debtors and in bankruptcy cases—to which the federal tax lien rules apply—than in the narrowly-defined insolvency situations to which the absolute priority statute is applicable. See note 15, *supra*. It is the federal tax lien provisions, not the absolute priority statute, that apply "in the vast majority of cases."

e. Respondent erroneously asserts that "[t]he legislative history of the Tax Lien Act and its predecessors confirms that the Congress intended for the Act to apply to all tax claims, even where the debtor is insolvent" (Resp. Br. 34). There is no support for that assertion, and respondent cites none. Instead, as we demonstrate in our opening brief (Pet. Br. 24-26), the legislative history is overwhelmingly to the contrary.

From the enactment of the predecessor of 26 U.S.C. 6323 in 1913 through the revisions of that statute in the Federal Tax Lien Act in 1966, nothing in the legislative history suggests that Congress intended to depart from the traditional protection it has afforded to the claims of the United States in insolvency cases under the absolute priority statute. Instead, as we describe in detail in our opening brief (Pet. Br. 24-28 & n.10), the history of the tax lien provisions reflects that Congress declined to enact several contemporaneous and related proposals to repeal

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[16] Respondent acknowledges that there are some "cases where the Tax Lien Act priorities would matter even though the debtor was solvent" (Resp. Br. 33). In addition to bankruptcy cases, priorities under 26 U.S.C. 6323 control when the proceeds of specific property involved in a case involving a solvent debtor are insufficient to satisfy the interests of the claimants. See *United States* v. *Cutting & Trimming, Inc.*, 206 F. Supp. 951 (D. Vt. 1962), aff'd *sub nom. United States* v. *Vermont, supra* (in an action to foreclose a tax lien, the absolute priority statute did not apply because the record disclosed no insolvency on the part of the taxpayer); *United States* v. *New Britain*, 347 U.S at 85-86.

or modify the absolute priority statute. When a similar bill to delete application of the absolute priority statute to tax claims was proposed in 1970, Congress again declined to enact it (Pet. Br. 27). This history of persistent congressional refusals to adopt the very amendment to the absolute priority statute that respondent now seeks to accomplish through litigation plainly does not constitute a "manifestation of congressional intent" impliedly to repeal that statute. *United States* v. *Key*, 397 U.S. at 324.

f. There is thus no logical inconsistency between the absolute priority statute and the federal tax lien statute. Application of the "clear[] * * * command" of the absolute priority statute does not deprive the tax lien provisions of meaning. And, the legislative history does not reflect any actual intent of Congress impliedly to repeal the absolute priority statute in enacting the federal tax lien provisions. The "plainest inconsistency" required to establish "an implied exception" to the absolute priority statute does not exist. *United States* v. *Emory*, 314 U.S. at 433.

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For the foregoing reasons and those stated in our opening brief, the judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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